RHB Trustees Bhd (trustee to Linggiu Valley Orang Asli (Jakuns) Trust) v Messrs Rosley Zechariah Advocate and Solicitors (sued as a firm) & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-17D-30–12 OF 2020
AHMAD KAMAL J
2 DECEMBER 2022

Civil Procedure — Bill of costs — Taxation — Plaintiff filed originating summons for taxation of defendants' bills for interest and benefit of trust — Whether provisions of Legal Profession Act 1976 was applicable to second defendant — Whether taxation was done within prescribed time

Civil Procedure — Striking out — Application for — Defendants applied to strike out plaintiff's originating summons — Whether originating summons ought to be struck out

The plaintiff was appointed as a trustee to manage the Linggiu Valley Orang Asli (Jakuns) Trust ('the trust') vide a High Court order in accordance to the Court of Appeal judgment. Upon the commencement of the duties of the plaintiff, there were, inter alia, six motions for leave to appeal to the Federal Court ('the six motions') pending against the Court of Appeal judgment. The first defendant was the solicitor and counsel on record for the court appointed interim receiver and manager ('R&M') of the said trust at the High Court and at the Court of Appeal while the second defendant was the counsel appointed by the first defendant at the Court of Appeal. The services of the defendants ended when the Court of Appeal ordered that the interim R&M shall within two months from the date of the Court of Appeal order relinquish their duties to HSBC Trustee or to the alternative trustee to be appointed by the High Court ie the plaintiff. The plaintiff sought confirmation of the legal fees to be charged by the defendants for handling the six motions and all other litigation matters. The first defendant issued a fee quote for both defendants to the plaintiff excluding disbursements and service tax, as their legal fees in respect of the six motions, over and above a daily refresher for both defendants. The plaintiff being dissatisfied with the quantum of legal fees quoted by the defendants terminated the services of the defendants. The first defendant issued a demand seeking sums of RM418,700 and RM3,547.82 to be paid by the trust to the first defendant and a further sum of RM159,212 on behalf of the second defendant for services rendered. The plaintiff filed an originating summons ('OS') for, inter alia, taxation of the defendants' bills for the interest and the benefit of the said trust. Subsequently, the defendants filed an

application seeking, inter alia, to strike out the whole of the plaintiff's OS on the following grounds: (a) the plaintiff agreed to tax the defendants' bills but failed to do so within the prescribed time frame pursuant to the Legal Profession Act 1976 ('the LPA') and therefore, the OS was time-barred; and (b) that the second defendant was appointed as a senior counsel to the first defendant and therefore, the provisions of the LPA did not apply.

Held, allowing the defendants' applications; and striking out the plaintiff's originating summons:

(1) In Malaysia, the provisions of the LPA applied to 'advocates and solicitors'. There was no difference and/or distinction between a solicitor and a counsel. The plaintiff applied to tax the bill of cost of the second defendant as the said bill of costs was issued and addressed to the plaintiff c/o the first defendant at the material time. Therefore, the second defendant's contention was untenable and misconceived (see paras 12 & 14–15).

(2) The plaintiff did not take any steps as envisaged under s 126 of the LPA to seek an order for taxation within the time period of six months. Hence, the bills had became absolute. The OS was doomed to fail as no order for extension had been obtained in accordance with the statutory time period. No notice had been issued to the advocate and solicitor as envisaged by s 128(1) of the LPA nor were there any material averment or special circumstances alluded to in the affidavit in support which would entitle the court to exercise the discretion in the plaintiff's favour. The plaintiff and its lawyers agreed that the plaintiff would undertake and file the application for taxation. However, they did not do so within the stipulated time as borne out by the OS (see paras 18–19, 22 & 24).

(3) The plaintiff did not adduce any cogent reason(s) as to why they did not tax the bills within the statutory time period and merely state that they were 'confused'. There could not be any 'confusion' as the plaintiff was represented by senior and experienced lawyers/counsels who was a former Bar Council Chairman who at all times was fully aware of the law. Further, the plaintiff had agreed in writing to undertake the taxation procedure themselves and the plaintiff had not replied to any of the numerous reminders sent by the first defendant to them. Therefore, failure on the part of the lawyer was no excuse and was not a good reason for the court to exercise its discretion in favour of the plaintiff. The plaintiff's OS was obviously scandalous, frivolous and vexatious and an abuse of court's process and hence should be struck out (see paras 25, 27–28 & 35).

[Bahasa Malaysia summary

Plaintif dilantik sebagai pemegang amanah untuk menguruskan Amanah Orang Asli (Jakun) Lembah Linggiu ('amanah') melalui perintah Mahkamah Tinggi menurut penghakiman Mahkamah Rayuan. Pada permulaan tugas plaintif, terdapat antara lain enam usul untuk kebenaran merayu kepada Mahkamah Persekutuan ('enam usul') yang belum selesai terhadap penghakiman Mahkamah Rayuan. Defendan pertama ialah peguam cara dan peguam dalam rekod bagi lantikan mahkamah sebagai penerima dan pengurus ('R&M') interim amanah tersebut di Mahkamah Tinggi dan di Mahkamah Rayuan manakala defendan kedua adalah peguam yang dilantik oleh defendan pertama di Mahkamah Rayuan. Perkhidmatan defendan berakhir apabila Mahkamah Rayuan memerintahkan bahawa R&M interim hendaklah dalam tempoh dua bulan dari tarikh perintah Mahkamah Rayuan melepaskan tugas mereka kepada Pemegang Amanah HSBC atau kepada pemegang amanah alternatif yang akan dilantik oleh Mahkamah Tinggi iaitu plaintif. Plaintif memohon pengesahan yuran guaman yang akan dikenakan oleh defendan untuk mengendalikan enam usul dan semua perkara litigasi lain. Defendan pertama mengeluarkan sebut harga yuran untuk kedua-dua defendan kepada plaintif tidak termasuk pembayaran dan cukai perkhidmatan, sebagai yuran guaman mereka berkenaan dengan enam usul, juga bayaran tambahan peguam untuk kedua-dua defendan. Plaintif tidak berpuas hati dengan kuantum yuran guaman yang disebut oleh defendan telah menamatkan perkhidmatan defendan. Defendan pertama mengeluarkan tuntutan menuntut sejumlah RM418,700 dan RM3,547.82 untuk dibayar oleh amanah kepada defendan pertama dan sejumlah RM159,212 lagi bagi pihak defendan kedua untuk perkhidmatan yang diberikan. Plaintif memfailkan saman pemula ('OS') untuk, antara lain, pencukaian bil defendan untuk kepentingan dan faedah amanah tersebut. Selepas itu, defendan memfailkan permohonan memohon antara lain, untuk membatalkan keseluruhan OS plaintif atas alasan berikut: (a) plaintif bersetuju untuk mencukai bil defendan tetapi gagal berbuat demikian dalam tempoh masa yang ditetapkan menurut Akta Profesion Undang-Undang 1976 ('APU') dan oleh itu, OS telah dihalang had masa; dan (b) bahawa defendan kedua telah dilantik sebagai peguam kanan kepada defendan pertama dan oleh itu, peruntukan APU tidak terpakai.

Diputuskan, membenarkan pemohonan defendan; dan membatalkan saman pemula plaintif:

(1) Di Malaysia, peruntukan APU digunakan untuk 'peguam bela dan peguam cara'. Tiada perbezaan dan/atau keistimewaan antara peguam cara dan peguam. Plaintif memohon untuk mencukai bil kos defendan kedua kerana bil kos tersebut telah dikeluarkan dan dialamatkan kepada plaintif c/o defendan pertama pada masa yang material. Oleh itu, pertikaian defendan kedua tidak dapat dipertahankan dan disalah anggap (lihat perenggan 12 & 14–15).

(2) Plaintif tidak mengambil apa-apa langkah seperti yang dinyatakan di bawah s 126 APU untuk mendapatkan perintah cukai dalam tempoh masa enam bulan. Oleh itu, bil telah menjadi mutlak. OS telah menjadi gagal kerana tiada perintah lanjutan telah diperolehi mengikut tempoh masa berkanun. Tiada notis telah dikeluarkan kepada peguam bela dan peguam cara seperti yang dinyatakan oleh s 128(1) APU dan tidak ada sebarang penegasan material atau keadaan khas yang disebut dalam afidavit sokongan yang akan memberi hak kepada mahkamah untuk menggunakan budi bicara yang memihak kepada plaintif. Plaintif dan peguamnya bersetuju bahawa plaintif akan melaksanakan dan memfailkan permohonan cukai. Walau bagaimanapun, mereka tidak berbuat demikian dalam masa yang ditetapkan seperti yang disahkan oleh OS (lihat perenggan 18–19, 22 & 24).

(3) Plaintif tidak mengemukakan apa-apa alasan kukuh mengapa mereka tidak mengenakan cukai terhadap bil dalam tempoh masa berkanun dan hanya menyatakan bahawa mereka 'keliru'. Tidak boleh ada sebarang 'kekeliruan' kerana plaintif diwakili oleh peguam/peguam kanan dan berpengalaman yang merupakan bekas Pengerusi Majlis Peguam yang pada setiap masa mengetahui sepenuhnya undang-undang. Selanjutnya, plaintif telah bersetuju secara bertulis untuk menjalankan prosedur percukaian itu sendiri dan plaintif tidak menjawab sebarang peringatan yang dihantar oleh defendan pertama kepada mereka. Oleh itu, kegagalan di pihak peguam bukanlah alasan dan bukan sebab yang baik untuk mahkamah menggunakan budi bicaranya memihak kepada plaintif. OS plaintif adalah jelas bersifat skandal, remeh dan menyusahkan serta penyalahgunaan proses mahkamah dan oleh itu harus dibatalkan (lihat perenggan 25, 27–28 & 35).]

Cases referred to

Amat Loyut & 162 Ors v Saling Lau Bee Chiang & 19 Ors [2014] MLJU 1923; [2013] MLRHU 1411; [2014] 1 CLJ 901, HC (refd)

Chua Cheng Wan v Chua Thiam Siew & Ors [1999] 3 MLRH 866; [2000] 1 CLJ 433, HC (refd)

HMJ Shaharom & KS Wee v Kumpulan Wang Amanah Pencen [2013] 3 CLJ 423; [2013] 1 MLRH 309, HC (refd)

Tanjung Emas Sdn Bhd v Adnan Sundra & Low [2001] MLJU 59; [2001] 7 MLRH 357, HC (refd)

Legislation referred to

Legal Profession Act 1976 ss 121(1), (2), 124, 126, 126(1), 127, 128(1), Part IX

Rules of Court 2012

Anantha Krishnan (with Srimurugan Alagan) (Srimurugan & Co) for the plaintiff.
Renu Sudarshini Zechariah (with Cheryl Kwan Chui Yi) (Rosley Zechariah) for the first defendant.
Prakash Menon (with Theebadarshini Retnakumar) (Isharidah Ho Chong & Menon) for the second defendant.

Ahmad Kamal J:

INTRODUCTION

[1] The plaintiff on 3 December 2020 filed an originating summons (OS) (encl 1) under various provisions of the Legal Profession Act 1976 ('the LPA') and the Rules of Court 2012 ('the ROC') for, inter alia, taxation of the first and second defendants bills of costs.

[2] The plaintiff OS seeks the following reliefs:

(a) that all the bills delivered to the plaintiff and/or their solicitors by the defendants be referred (reference) to the taxing officer to be taxed;

(b) that the taxing officer taxes the bills of the reference and certifies what amount shall be found due by the plaintiff to the defendants pursuant to the LPA;

(c) that the defendants give an account of all sums of money received by the defendants from or on account of the plaintiff and refund all sums (if any) in excess of the sums due to the defendants subsequent to such taxation;

(d) that no action be commenced or prosecuted by the defendants to recover the amounts stated in their bills pending the disposal of this action;

(e) that upon payment by the plaintiff of what (if anything) may be due to the defendants after taxation, the defendants do deliver up to the plaintiff or as the court may direct, all deeds, books papers and writings and documents in the defendants possession, custody or power belonging to the plaintiff;

(f) that in the event this action is found to have been filed beyond the time frame permitted under the LPA to seek taxation, then an extension of time be granted to file and commence this action and that this action be deemed to have been filed within time;

(g) that the plaintiff is at liberty to apply;

(h) costs of this proceedings ought to be pursuant to s 127 of the LPA; and

(i) any other further relief and order that this honourable court thinks just, fit and reasonable.

BACKGROUND FACTS

[3] The background facts of this case based on the plaintiff's grounds of OS are as follows:

(a) the plaintiff was appointed as a trustee to manage the Linggiu Valley Orang Asli (Jakuns) Trust ('the trust') on 10 March 2019 vide the Johor Bharu High Court order dated 10 March 2019 (Suit No 22–228 of 2009) in accordance to the Court of Appeal judgment on 17 January 2019;

(b) upon commencement of the duties of the plaintiff, there were, inter alia, six motions for leave to appeal to the Federal Court pending against the Court of Appeal judgment of 17 January 2019;

(c) at the material times, the first defendant were solicitors and counsels on record for the court appointed interim receiver and manager (R&M) of the said trust at the High Court and at the Court of Appeal and the second defendant was counsel appointed by the first defendant at the Court of Appeal;

(d) the services of the defendants ended when the Court of Appeal ordered that the interim R&M shall within two months from the date of the Court of Appeal order dated 17 January 2019 relinquish their duties to HSBC trustee or to the alternative trustee to be appointed by the High Court, ie the plaintiff;

(e) the plaintiff sought confirmation of the legal fees to be charged by the defendants for handling the six motions for leave to appeal at the Federal Court and all other litigation matters via plaintiff's letter dated 11 April 2019;

(f) the first defendant issued a fee quote for both defendants to the plaintiff via email dated 5 December 2019 seeking RM750,000 excluding disbursements and service tax, as their legal fees in respect of the six motions for leave to appeal at the Federal Court, over and above a daily refresher for both defendants;

(g) on 3 January 2020, a meeting was held at the plaintiff's office in order for the plaintiff to discuss legal fees proposed by the defendants in respect of the six motions for leave to appeal at the Federal Court and this resulted in the plaintiff's officer attending the first defendant's office on 7 January 2020 in order to peruse the documents in respect of the six motions for leave to appeal at the Federal Court to get a better idea as to the work done;

(h) on or about 28 January 2020, the plaintiff requested for all the documents in respect of the six motions for leave to appeal at the Federal Court to be handed over to the plaintiff for the plaintiff's perusal. The first defendant responded on the same date but only agreed to pass the requested document provided it be returned to them by 10 February 2020;

(i) the plaintiff being dissatisfied with the quantum of legal fees quoted by the defendants terminated the services of the defendants on or about 10 February 2020;

(j) as such, on or about 12 February 2020 the plaintiff appointed Messrs Kesavan as solicitors for the plaintiff to act in respect six motions for leave to appeal at the Federal Court on a pro bono basis;

(k) on or about 5 October 2020, the first defendant issued a demand dated 5 October 2020 seeking a sum of RM418,700 and a sum of RM3,547.82 to be paid by the trust to the first defendant. Further, the first defendant also demanded a sum of RM159,212 on behalf of the second defendant for services rendered;

(l) in the interim, the plaintiff has made payment in the sum of RM18,700.99 to the first defendant; and

(m) therefore, the plaintiff's, inter alia, seeks an order from court to tax the defendants bills for the interest and the benefit of the said trust as the monies in the trust are for the benefit, well-being and the advancement of the Orang Asli (beneficiaries).

THE STRIKING OUT APPLICATION

[4] Subsequently, the first defendant together with the second defendant filed an application dated 17 December 2020 (encl 5) and 4 January 2021 (encl 7) respectively seeking, inter alia, to strike out the whole of the plaintiff's OS.

[5] The defendants' applications, encls 5 and 7 is to strike out the said OS on the following grounds:

(a) the plaintiff agreed to tax the defendants' bills but failed to do so within the prescribed time frame pursuant to the LPA;

(b) therefore, the said OS is time-barred, ie, limitation and the defendants' bills are absolute; and

(c) that the second defendant is appointed as a senior counsel to the first defendant and therefore, the provisions of the LPA does not apply.

[6] Both encls 5 and 7 have been fixed to be heard together. After the hearing, I allowed the defendants' applications in encls 5 and 7 respectively. This judgment contains the full reasons for my decision.

THE DECISION OF THE COURT

[7] Upon the perusal of the cause papers, it is to be noted that the following facts are not disputed:

(a) the first defendant firm was appointed to render legal services to the plaintiff with regards to handling the pending and new litigation matters and to render advisory services undertaken by and against the plaintiff as trustee for the trust. The entire work done is as summarised in the first defendant letter dated 13 February 2020 to the plaintiff;

(b) the first defendant was appointed by the plaintiff from 1 April 2019 and their services were terminated on 19 February 2020;

(c) during that period, the first defendant rendered services to the plaintiff for the following matters:

(i) Kuala Lumpur High Court Winding Up Petition No WA-28NCC-728–10 of 2017;

(ii) Shah Alam High Court BN No BA-29NCC-3184–05 of 2019;

(iii) Shah Alam High Court BN No BA-29NCC-3185–05 of 2019;

(iv) Johor Bahru High Court Suit No 23NCVC-106–07 of 2012;

(v) Court of Appeal Appeal No W-02(IM)(NCC)-1656–09 of 2019;

(vi) Kuala Lumpur High Court BN No WA-29NCC-1648–05 of 2019;

(vii) Kuala Lumpur High Court OS No WA-24NCVC-1076–05 of 2019;

(viii) Federal Court Civil Appeal Application No 08(f)-43–02 of 2019 (J);

(ix) Federal Court Civil Appeal Application No 08(f)-44–02 of 2019 (J);

(x) Federal Court Civil Appeal Application No 08(f)-45–02 of 2019 (J);

(xi) Federal Court Civil Appeal Application No 08(f)-46–02 of 2019 (J);

(xii) Federal Court Civil Appeal Application No 08(f)-50–02 of 2019 (J); and

(xiii) Federal Court Civil Appeal Application No 08(f)-51–02 of 2019. (J). (Litigation Matters)

(d) the first defendant delivered ten invoices to the plaintiff for their settlement of fees for the litigation matters as set out herein:

Date	Invoice No	Amount (RM)	Date of Delivery
3 January 2020	01.001.20 [Inv1]	82,150	3 January 2020
4 February 2020	02.001.20 [Inv 2]	15,900	10 February 2020
4 February 2020	02.002.20 [Inv 3]	15,900	10 February 2020
12 February 2020	02.009.20 [Inv 4]	31,800	17 February 2020
12 February 2020	02.010.20 [Inv 5]	10,600	17 February 2020
12 February 2020	02.012.20 [Inv 6]	15,900	17 February 2020
12 February 2020	02.015.20 [Inv 7]	26,500	17 February 2020
12 February 2020	02.017.20 [Inv 8]	7,950	17 February 2020
12 February 2020	02.018.20 [Inv 9]	212,000	17 February 2020
13 February 2020	[Inv 10]	159,212	17 February 2020
	TOTAL	577,912	

(e) Prakash Menon of the firm of the second defendant has been appointed/briefed by the first defendant, as senior counsel with the consent and knowledge of the then, receivers and managers (R&M) to work together with the first defendant to defend the six appeals filed against the R&M in the Court of Appeal;

(f) the said six appeals were successfully defended and the Court of Appeal dismissed all the appeals with costs;

(g) thereafter, there were six motions for leave to appeal filed in the Federal Court against the decision of the Court of Appeal and the second defendant continued to be retained/briefed as Senior counsel to assist the first defendant with the consent and knowledge of the R&M and in successfully applying and obtaining security of costs in the six motions filed by the appellants in the total sum of RM250,000;

(h) subsequent to the plaintiff's appointment as the trustee for the trust, in place of the R&M pursuant to the Court of Appeal order, the first defendant continued to retain/brief the second defendant as senior counsel with the consent and knowledge of the plaintiff, to defend and oppose the six motions for leave filed against the R&M and subsequently the plaintiff;

(i) the Invoice 1 to Invoice 8 were for services rendered by the first defendant in the Litigation Matters itemised as items (i) to (vii) in para 7(c) above;

(j) the Invoice 9 and Invoice 10 were for services rendered by the defendants in the Litigation Matters itemised as items (viii) to (xiii) in para 7(c) above ie the six Federal Court motions ('the six FC motions'); A

(k) to date the said ten invoices have not been settled and the first defendant had filed an action against the plaintiff for the same vide Kuala Lumpur Sessions Court Suit No WA-B52NCvC-434–11 of 2020 ('KLSC Suit 434') on 19 November 2020 which is ongoing and which is being defended through Messrs Srimurugan & Co; and B

(l) after the KLSC Suit 434 had been filed, the plaintiff filed this OS on 3 December 2020 seeking to have the ten invoices 'taxed'. C

WHETHER THE PROVISIONS OF THE LPA IS APPLICABLE TO THE SECOND DEFENDANT

[8] The second defendant submits that the second defendant was briefed as senior counsel by the first defendant and hence, the provisions in relation to taxation do not apply to the second defendant. D

[9] Further, the second defendant submits that a careful perusal of the provisions for Recovery and Taxation of Costs under Part IX of the LPA, relates to taxation of costs between a solicitor and client and not where an advocate is briefed as senior counsel. E

[10] As the second defendant had no direct dealing with the plaintiff nor were any instructions given by the plaintiff to the second defendant and there was no solicitor-client relationship. F

[11] The second defendant therefore takes the position and submits that the OS is flawed and misconceived in law as the express provision of s 121(2) of the LPA specifically excludes the application of s 121(1) of the LPA with regard to the issue of bill of costs of a senior counsel. Hence, the OS fails against the second defendant. G

[12] On this issue, I am not in an agreement with the second defendant's submission. I find that in Malaysia, the provisions of the LPA applies to 'advocates and solicitors'. There is no difference and/or distinction between a solicitor and a counsel. H

[13] This has been explained by Abdul Rahman Sebli J (now FCJ) in the case of *Amat Loyut & 162 Ors v Saling Lau Bee Chiang & 19 Ors* [2014] MLJU 1923; [2013] MLRHU 1411; [2014] 1 CLJ 901 when His Lordship held as follows: I

(2) *In Malaysia, those who practice law were both advocates and solicitors pursuant to s 3*

A *of the Legal Profession Act 1976. It was a misconception to say that lawyers in Malaysia were either advocates or solicitors but not both*. Although there was no definition of counsel in the Legal Profession Act 1976, it did not mean that an advocate and solicitor of the High Court of Malaya was not subject to O 59 r 6(1) of the ROC. (Emphasis added.)

B

[14] In the instant case, I find that the plaintiff applied to tax the bill of cost of the second defendant as the said bill of cost was issued and addressed to the plaintiff c/o the first defendant at the material time.

C

[15] Therefore, based on *Amat Loyut & Ors*, the second defendant's contention on this issue is untenable and misconceived.

WHETHER THE TAXATION WAS DONE WITHIN THE PRESCRIBED TIME

D

[16] It is not disputed that taxation procedure of a legal firm's bills is governed by the LPA and s 124 of the LPA clearly requires that a bill of costs to be delivered to the chargeable person prior to any commencement of proceedings for the recovery of the costs.

E

[17] The LPA expressly provides under s 126(1) of the LPA as to the mode and the timeline to challenge a bill that is delivered under s 124 of the LPA in that the party chargeable (the plaintiff) has to do so within six months of the delivery of the bill to obtain an order for taxation of the bill by way of a petition failing which the bill become absolute.

F

[18] In the instant case, I find that the plaintiff did not take any steps as envisaged under s 126 of the LPA to seek an order for taxation within the time period of six months. Hence, the bills have become absolute.

G

[19] The LPA provides that the plaintiff (as the party chargeable to pay the bills) may apply to extend time between the six months to up to the one year period as provided for in s 128(1) of the LPA. I view that the OS is doomed to fail as no order for extension has been obtained in accordance with the statutory time period.

H

[20] Section 128(1) of the LPA states as follows:

I

128 Order for taxation of advocate and solicitor's bill on notice given

(1) After the expiration of six months from the delivery of a bill of costs, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the Court.

(2) No such order for taxation shall in any event be made after the expiry of one year from the delivery of the bill of costs.

[21] The above s 128(1) of the LPA, entitles the party chargeable (the plaintiff) to seek an extension of time to obtain an order for taxation beyond the six months, however no order shall be made for taxation of a solicitors bill of costs except upon notice to the advocate and solicitor and under special circumstances to be proved to the satisfaction of the court.

(See *HMJ Shaharom & KS Wee v Kumpulan Wang Amanah Pencen* [2013] 3 CLJ 423; [2013] 1 MLRH 309; *Tanjung Emas Sdn Bhd v Adnan Sundra & Low* [2001] MLJU 59; [2001] 7 MLRH 357.)

[22] I have perused the cause papers and I find that no notice has been issued to the advocate & solicitor as envisaged by s 128(1) of the LPA nor are there any material averment or special circumstances alluded to in the affidavit in support which would entitle the court to exercise the discretion in the plaintiff's favour.

[23] The plaintiff submits that the first defendant agreed to tax the defendants bills but failed to do so. As a result of the first defendant omission to attend to the taxation of the defendants bills, the plaintiff proceeded to file the said OS.

[24] In the instant case, I find that the plaintiff and the plaintiff's lawyers Messrs Kesavan had both expressly agreed in writing that the plaintiff will undertake and file the application for taxation. However, I find that they did not do so within the stipulated time as borne out by this OS.

(See exh 'RZ1' in encl 6 pp 48, 55, 57, 59, 66–67 and 81.)

REASON(S) AND/OR SPECIAL CIRCUMSTANCES

[25] I find that the plaintiff did not adduce any cogent reason(s) as to why they did not tax the bills within the statutory time period and merely state that they were 'confused'.

[26] This can be gleaned from the affidavit of Tony Chieng Siong Ung dated 3 December 2020 when he said at para 41 as follows:

> la adalah jelas bahawa terdapat kekeliruan (*some level of confusion*) mengenai siapa yang akan membuat penetapan (*taxation*) bil-bil Defendan-Defendan dan saya sesungguhnya percaya bahawa Amanah tidak boleh dihukum (*penalized*) kerana atas kekeliruan tersebut.

[27] I am of the view that there cannot be any 'confusion' as the plaintiff was

represented by senior and experienced lawyers/counsels who is a former Bar Council Chairman who at all times was fully aware of the law. Further, the plaintiff had agreed in writing to undertake the taxation procedure themselves and the plaintiff had not replied to any of the numerous reminders sent by the first defendant to them.

[28] Therefore, I am of the view that failure on the part of the lawyer is no excuse and is not a good reason for this court to exercise its discretion in favour of the plaintiff. To me, there is no special circumstances.

[29] In *Chua Cheng Wan v Chua Thiam Siew & Ors* [1999] 3 MLRH 866; [2000] 1 CLJ 433, Abdul Wahab Patail J (as His Lordship then was) held as follows:

> It is also my considered opinion that *even if the predicament of the plaintiff arises from a mistake of the counsel, it would not have been reason for the exercise of the discretion to reinstate even if it exists. A lawyer's mistake is not an excuse.* In *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129 (FC) it was held that *the mistake of the appellant's solicitors did not constitute a sufficient ground for granting the extension of time*. The law here in Malaysia as was pointed out by Suffian FJ (as he then was) in the case of *Chong Kueng Ying & Ors v Lovis Lavagna* [1972] 1 MLJ 180 is the same as the previous English Law — *the mistake of a legal adviser is not a sufficient ground for granting special leave to appeal*. Similarly, in *Chin Hua Sawmill Co Sdn Bhd v Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 it was held that the *failure to serve a notice of appeal on the respondent within the prescribed period owing to a mistake of a solicitor was not a ground for granting special leave.* (Emphasis added.)

[30] The plaintiff further submitted, that the first defendant had agreed to 'render' fee quotes but did not do so.

[31] I find that this submission is untenable because the plaintiff has agreed that the work had been done and were not disputing the contents of the ten invoices but is only seeking to have the quantum taxed by this OS.

[32] This can be gleaned from para 5 of the encl 10 when the plaintiff avers and admits as follows:

> *Save and except that the first defendant was appointed* by the plaintiff *to render legal services* with regards to the *continuation of pending* and *new litigation matters* and *(as stated/listed in Paragraph 5 of the first defendant's Affidavit in Support) for the plaintiff as trustee for the trust*. (Emphasis added.)

In para 8(a) of encl 10, the plaintiff avers and admits that:

> Vide the plaintiff's letter dated 17 February 2020, the plaintiff (among others) have informed the first defendant that the first defendant (wrongly stated as the first defendant should be 'the plaintiff') will pay the bills *after having the same taxed* by the court. (Emphasis added.)

[33] Based on the above, it is clear that the work had indeed been carried out by the first defendant (as admitted and conceded to by the plaintiff) and the plaintiff has opted to seek a taxation of the bills which is only a challenge on the quantum of the bill which does not render the bills invalid for reason of there being no fee quote.

[34] All in all, after perusing the plaintiff's averment and the cause papers, I am of the view that plaintiff had failed to provide good and cogent reason/reasons for this court to exercise its discretion in favour of the plaintiff.

CONCLUSION

[35] Based on the aforesaid reasons, I am of the considered view that the plaintiff's OS is obviously scandalous, frivolous and vexatious and an abuse of court's process, hence should be struck out.

[36] As such, the defendants' application in encls 5 and 7 are allowed and as a consequence, the plaintiff's OS (encl 1) is struck out with costs of RM5,000 to both the first and second defendants respectively with the allocator fee.

Defendants' applications allowed; and plaintiff's originating summons struck out.

Reported by Nabilah Syahida Abdullah Salleh